

In the Media



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Leniency and the Brazilian antitrust enforcement

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Cartel prosecution is the top priority of the Brazilian antitrust authorities' enforcement agenda. In order to improve the public prosecution of the Antitrust Law (Law n. 8,884/1994), the Secretariat of Economic Law (SDE) has developed an effective leniency program with a solid policy and a standard agreement for reference. The leniency is an efficient mechanism to grant immunity or reduction of penalties for antitrust violation in exchange for cooperation with the antitrust authorities.

"Cartel is a Crime - Be the first to leave." With this message in websites, posters and more than 80,000 postcards, SDE has recently stressed the relevance of leniency for the success of its cartel prosecution throughout Brazil. Since cartel is hard to detect and investigate without material proof, the cooperation of one of its members is strategic.

The administrative prosecution of cartels is carried out by the SDE and the practice can be sanctioned by the Administrative Council for Economic Defense (CADE) with fines that may vary from 1 to 30% of the total turnover of the company, as well as other obligations and restrictions. The directors, officers and other members involved can also be punished with fines from 10 to 50% of their company's fine.

Additionally, Brazil also fights cartels with criminal prosecution, which is coordinated by the State and Federal Polices and Public Prosecutors. SDE has the goal of "securing conviction and jail sentences to optimize deterrence of cartel conduct," according to its leniency guidelines. Individuals from the companies directly involved in a cartel are subject to administrative and criminal penalties, including two to five years of jail time, as set forth by the Brazilian law.

Considering this framework, leniency in Brazil provides incentives to the cartel member, since SDE can grant full administrative and criminal immunity to the applicant. The benefit granted to qualified company (which cannot be the leader of the cartel) shall also benefit its directors, officers and employees involved in the cartel, since they cooperate with the authorities and agree to execute a leniency agreement.

In order to apply for the leniency, the company or individual shall submit its application to SDE in writing or orally and shall be advised by an antitrust lawyer. The party must be able to disclose the scope, purpose, members, period, market and geographic extension of the cartel (i.e., answer the questions “what?”, “when?”, “who?” and “where”). A document with this information will be drafted by the authority and the applicant’s lawyer and then executed by the applicant. These procedure is entirely confidential and the access to the negotiation phase is restricted to the Secretary of Economic Law and his Chief of Staff. In case the negotiation is not successful, all the documents and information provided by the applicant are returned and can not be used by SDE.

The applicant must be the first to propose leniency to the Secretary of Economic Law and the SDE will accept only if it does not have enough information to carry out a potentially successful cartel investigation and prosecution. SDE shall grant a marker – valid for 30 days – in order to protect the applicant’s position as the first cartel member to cooperate. The applicant shall comply with the following requirements: (a) to confess the participation in the cartel; (b) to cease and desist from the unlawful practice; (c) to declare that it was not the leader of the cartel; and (d) to agree to cooperate with the investigation. Its cooperation with the authorities shall result in the identification of the other cartel members and the gathering of documents and additional evidences.

A cartel member that can not qualify for the leniency regarding this first case, but has evidence regarding another undisclosed cartel, can be benefited with immunity in connection with the second act and reduction of one third of the penalty concerning the first cartel. In this sense, this applicant must comply with the leniency requirements for the second cartel and apply for the benefit before the remittance of the first case to CADE’s scrutiny.

The leniency agreement is an efficient tool for the Brazilian antitrust authorities in order to guarantee the increasing enforcement of the Antitrust Law. Although the agreement does not protect the applicant from civil claim from third parties requesting compensatory damages, the economic players shall also consider leniency an attractive mechanism in order to refrain from an anticompetitive act (cartel) and benefit from immunity or reduction of administrative and criminal penalties.

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